

## THE STANDING RECEIVER IN BANKRUPTCY IN NEW YORK

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### I.

FROM time to time persons acquainted with the administration of bankruptcy in the federal courts have demonstrated that the traditional procedure of handling such cases was open to severe criticism, and that in many instances funds had been misappropriated, bribes accepted, and other abuses practiced. In fact, it is not unusual to find the opinion that bankruptcy matters are generally administered dishonestly.

Customarily, bankruptcy administration provides for the election of a trustee at a meeting of creditors of the estate, and for the appointment of a receiver by the court at the time of adjudication of bankruptcy in such cases where, in the court's judgment, the condition of the bankrupt's assets requires that there be some supervision between the time of adjudication of bankruptcy and the election of the trustee.<sup>1</sup> In practice, receivers are appointed in most "asset cases," and the major portion of the activity of liquidation usually takes place prior to the election of the trustee,<sup>2</sup> whose task generally centers about creditor's rights except when the operations of the business are to be continued. The trustee and the receiver deal with the court through the referee, who relieves the judge of much of the detailed work necessary in the

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1. 30 STAT. 545 (1898), 11 U. S. C. § 11(3) (1934); *cf.* 52 STAT. 842 (1938), 11 U. S. C. § 11a(3) (Supp. 1938).

2. W. J. DONOVAN, *et al*, ADMINISTRATION OF BANKRUPT ESTATES, REPORT . . . OF AN INQUIRY . . . CONDUCTED BEFORE HON. THOMAS D. THACHER, JUDGE OF THE UNITED STATES DISTRICT COURT . . . House Judiciary Committee ed., 71st Cong., 3d Sess. (1931) 8-9. Hereafter referred to as DONOVAN REPORT. 30 STAT. 552 (1898), 11 U. S. C. § 44(a); *cf.* 52 STAT. 852 (1938), 11 U. S. C. § 44(a) (Supp. 1938).

administration of a case.<sup>3</sup> The referee also makes the final statistical report of each case after it is closed and the bankrupt has been discharged.

It has been the practice, in all the federal districts, for receivers to be appointed from members of the bar at the discretion of the judges, who sometimes have delegated their appointive power to a referee. Quite frequently the attorney for the petitioning creditor was named receiver.<sup>4</sup> Trustees are usually elected at a poorly-attended meeting of creditors. Consequently, one who has been active in the solicitation of proxies can readily dominate the election.<sup>5</sup> Such procedures have set the stage for the selection of self-serving officials, who often misused their powers.<sup>6</sup>

The purpose of this Article is to investigate certain results of an experiment with a standing receiver, which was tried for some years in the Southern District of New York. The scheme of turning over all cases to a permanent official was, and still is,<sup>7</sup> proposed as a way out of the unsatisfactory condition of bankruptcy administration. Actual use of this device in New York makes possible the setting of a factual basis for a discussion of the merits and demerits of this reform.

At the request of the federal district judges in New York City, the Irving Trust Company agreed to accept appointments as receiver in all bankruptcy cases for which the court deemed the appointment of a

3. UNITED STATES PRESIDENT, STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM, TOGETHER WITH THE REPORT OF THE ATTORNEY GENERAL ON BANKRUPTCY LAW AND PRACTICE, SEN. DOC. NO. 65, 72d Cong., 1st Sess. (1932) 29. Hereafter referred to as THACHER-GARRISON REPORT. 30 STAT. 556 (1898), 11 U.S.C. § 67 (1934); cf. 52 STAT. 858, 11 U.S.C. § 67 (Supp. 1938).

4. DONOVAN REPORT 41.

5. *Id.* at 13-14, 40-45. THACHER-GARRISON REPORT 30-38.

6. In addition to DONOVAN REPORT and THACHER-GARRISON REPORT, consult: REPORT OF SPECIAL COMMITTEE ON BANKRUPTCY OF THE MERCHANTS' ASSOCIATION OF NEW YORK (1924) summarized in 1 IRVING TRUST COMPANY, REPORT . . . AS RECEIVER AND TRUSTEE IN BANKRUPTCY PROCEEDINGS AND AS RECEIVER IN EQUITY CAUSES FOR THE CONSERVATION OF ASSETS IN THE SOUTHERN DISTRICT OF NEW YORK (1932) 18, hereafter referred to as IRVING REPORT, with designation of volume number; REPORT OF THE SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1925), summarized in 1 IRVING REPORT 34-40; REPORT OF THE STANDING COMMITTEE ON COMMERCIAL LAW AND BANKRUPTCY OF THE AMERICAN BAR ASSOCIATION (1928), summarized in 1 IRVING REPORT 40-42; *Memorandum of the United States District Court for the Southern District of New York to the United States Supreme Court* (Oct. 31, 1929) reprinted in 1 IRVING REPORT 44-45; *Hearings before House Committee on the Judiciary on Receiver and Bankruptcy Investigation in Chicago*, 73d Cong., 1st Sess. (1934, committee print); H. R. JUD. COMM. REP. ON RECEIVERSHIP AND BANKRUPTCY INVESTIGATION IN CHICAGO, 73d Cong., 2d Sess. (1934, committee print); *Hearings before Senate Judiciary Subcommittee on Bankruptcy and Receivership Proceedings in Los Angeles*, 73d Cong., 2d Sess. (1934).

7. Attorney General Murphy has appointed a committee to investigate the administration of bankruptcy, and to prepare appropriate recommendations for needed improvements. One specific item mentioned in the instructions to the committee is the feasibility of permanent referees, receivers and trustees. United States Dep't of Justice Release, Apr. 12, 1939.

receiver necessary, and received the first appointments January 16, 1929.<sup>8</sup> Subsequently, the trust company was designated in court rules as standing receiver. It served in that position until July 15, 1934, when the court acceded to newly-passed legislation which made impossible the assignment of all receiverships to one person. During the first part of this five-year period, the company was named receiver in all bankruptcy cases in the district, but after July 1, 1931, the area in which it was standing receiver was limited to the counties of New York and Bronx, and the cities of Yonkers, White Plains, Mount Vernon and New Rochelle.<sup>9</sup> Nevertheless, the company was occasionally appointed receiver in other areas in the district, although not on an exclusive basis. It also received occasional appointments in composition and equity cases. In most of the bankruptcy cases in which the trust company was named receiver, it was subsequently elected trustee by the creditors of the estate.<sup>10</sup> After July 15, 1934, however, the company accepted no new appointments as receiver. Altogether, it acted in 4,367 cases of bankruptcy, as to which reports of referees were filed with the court, as well as in an unknown number of compositions, equity receiverships, proceedings under Section 77B, custodianships and ancillary proceedings.<sup>11</sup> With but one exception, no similar experiment with the device of a standing receiver in bankruptcy had ever been tried anywhere else in the United States.<sup>12</sup>

The change in the rules of court in 1934 which ended the standing receivership of the Irving Trust Company came as a result of legislation

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8. The judges determined to use a trust company, and in order to avoid possible charges of favoritism, selected one with which none of them had had close personal connections. Also, the Irving Trust Company was at the time the most conveniently located to the court. *Hearings before House Judiciary Subcommittee on H. R. 145*, 73d Cong., 2d Sess. (unprinted, 1933; page references are to the typescript record) 535-537, 647. Hereafter referred to as *CELLER HEARINGS*.

9. This limitation was made at the request of the trust company which found it impracticable to administer small-asset cases in the more remote areas of the district; that is, the following counties: Columbia, Dutchess, Greene, Orange, Putnam, Rockland, Sullivan, Ulster and the remainder of Westchester. This limitation lends credence to the contention that the device of standing receivers will not be useful in larger areas, or where the volume of cases is smaller. But in Michigan, the standing receiver operated successfully over a larger area. See note 12, *infra*.

10. With the consent of the court, Irving Trust Company as receiver distributed to creditors proxy forms for the election of trustee, on which the availability of the trust company as trustee was stated. The trust company was elected in the following percentages of cases in the following fiscal years: 1929, 71%; 1930, 80%; 1931, 89%; 1932, 91%; 1933, 86%. 2 *IRVING REPORT* (1933) 18. Statistics for later years have not been made available by the trust company.

11. Irving Trust Company states that figures for number and type of appointments received after June 30, 1933 are not available. Up to that date Irving had been named receiver, co-receiver, trustee or custodian in 5,122 cases under the bankruptcy laws, and had also been appointed in 122 cases in equity. 2 *Id.* at 18.

12. In the Eastern District of Michigan, the Union Guardian Trust Co. of Detroit occupied the position of standing receiver from Sept. 8, 1930, until Feb. 11, 1933.

sponsored by opponents of "monopoly" and was included in the bill which enacted Section 77B of the Bankruptcy Act. This legislation was similar in effect to bills previously introduced specifically to change the situation in New York City,<sup>13</sup> which had been investigated in 1933 by a congressional sub-committee. In its own words, the new law required that courts "so apportion appointments of receivers and trustees . . . as to prevent any person, firm, or corporation from having a monopoly of such appointments."<sup>14</sup> The new provision was a disappointment to the judges in the district, who were apparently well satisfied with the work being done by the standing receiver.<sup>15</sup>

The trust company had requested that it be relieved of its duties for some time before the law was altered,<sup>16</sup> consequently the court no longer appointed it receiver after July 15, 1934. However, it remained in charge of the cases previously assigned to it, and by the end of June, 1939, had completed the work in all but 29 of the bankruptcy cases, exclusive of 77B proceedings, under its administration.

The existence of this small balance of open cases makes it impossible to give a final report of the work done by the standing receiver.<sup>17</sup> Nevertheless, the bulk of the work has been completed, and there is little reason to think that the conclusions reached below would be altered by the additional material. No one can predict with certainty when the last of the open cases will be closed. Meanwhile, the question of establishing standing receivers and trustees in all judicial districts has been reopened, and hence a study bringing the New York statistics down-to-date should be of interest.

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13. H. R. JUD. COM. REP. ON H. R. 8832, 73d Cong., 2d Sess. (1934) 1 *et seq.*, hereafter referred to as *CELLER REPORT*.

14. 48 STAT. 923 (1934), 11 U. S. C. § 76(a) (1934). The Bankruptcy Act of 1938 did not reenact this provision, nor did it specifically repeal it. See 52 STAT. 940; 11 U. S. C. § 204 (Supp. 1938).

15. N. Y. L. J., July 13, 1934, p. 113, col. 6.

16. *Ibid.* The management of the trust company felt that the amount of publicity being given to their receivership business would obscure their principal activity, which was a general banking business. The indications, at present, are that, while the trust company would favor the use of a standing receiver in New York, it would not accept reappointment.

17. Until the preparation of figures for this study no data on cases closed after June 30, 1933, in which Irving had acted as receiver or trustee, had been published. The original referees' reports were on file at the district courthouse, but they had not been examined in this connection. The records of Irving Trust Company did not contain statistics comparable to the referees' reports. In preparing *IRVING REPORTS* (which cover the period to June 30, 1933) the trust company consulted the referees' reports. *CELLER HEARINGS* 730.

## II.

The following statistical comparison of the work of the standing receiver in New York with the performance of other types of receivers in the same district is not based upon all types of bankruptcy and equity cases. The impracticability of obtaining comparable data limits the comparison to bankruptcy cases which proceeded either to liquidation or to sale of a going concern for money. These formed the great majority of the cases coming under the Bankruptcy Act during the period under investigation. Data for them are to be found in the reports of referees, which are filed with the court when a case is finally concluded. 4,367 cases of this type were given to the Irving Trust Company as standing receiver, and 4,338 had been concluded by June 30, 1939. In the same period, 23,856 cases of the same type were concluded in the district following administration in some other way. Receivers had been appointed in some of these cases prior to or after the incumbency of the standing receiver. In other cases, receivers were appointed in outlying parts of the district during the incumbency of the standing receiver, and in the rest, no administrator was appointed because of the absence of assets or for some other reason.<sup>18</sup> The size of these two groups of cases makes it possible to assume with some confidence that a fair sample of the activities of the two types of administration has been collected, and that statistical comparisons are, therefore, justified.

The most useful statistical measure of the efficiency of administration of a bankruptcy estate is the relationship of "Fees and Expenses of Administration" to "Gross Assets Realized," because it provides a direct measure of costs in terms of the funds actually collected. But it cannot be used as the only measure of efficiency since certain types of activity which would be beneficial to creditors might not be reflected in a lowering of the ratio. For instance, if the administrator collected more funds, the creditors would benefit even though the ratio of expenditures were unchanged. Consequently, the ratio of amounts "Paid to Unsecured Creditors" to the "Unsecured Claims Allowed" must also be considered. This ratio is more subject to outside variables, such as varying amounts of secured and priority claims, and, in the years prior to fiscal 1934, the inclusion of claims of "no asset" cases in the amount reported as unsecured claims allowed.

Certain of the items entering into these ratios require definition. The item "Gross Assets Realized," contrary to first impression, is the amount realized from the bankrupt estate after the deduction of the expenses

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18. As used hereafter, the terms "administered by others" and similar phrases include those cases which had no administrator.

of continuing the business, but before payments to creditors or for expenses of administration.<sup>19</sup>

The item "Fees and Expenses of Administration" is made up of many types of expenditure, some of which can be controlled by the receiver or trustee more closely than can others. Maximum fees are fixed by statute or by rules of court.<sup>20</sup> These cover commissions to receivers, trustees, referees and auctioneers, and generally are based upon the value of the assets handled. Other costs vary with each case. Some represent direct expenditure by the administrator or his delegates. The remainder are for services rendered by others. The receiver's or trustee's influence over these charges is based upon the power to recommend to the court reductions in the amounts requested. Padding expenses was not an infrequent occurrence before the appointment of the standing receiver; therefore certain savings were possible.<sup>21</sup>

In the typical case, the bulk of the fees and expenses of administration are incurred during the first few months after the declaration of bankruptcy. During this period assets are assembled and appraised, and many of them are sold. During and following this period of activity there may be some litigation in which legal expenses are incurred, but even in such cases, it is unusual for more than one year to elapse before the administration has been put on a routine basis with no further expenses to be charged, other than the statutory fee of the trustee based on the funds passing through his hands. This situation is typical both of liquidation cases and of cases in which business operations continue, since the ordinary expenses of doing business are not included in the fees and expenses of administration.

Before proceeding to the statistical results of the investigation, it is desirable to outline briefly the calculation of fees and expenses in an individual case, and to discuss the major opportunities for increased efficiency which were taken advantage of by the standing receiver.

The Irving Trust Company calculated fees and expenses as follows. It included the fees and expenses of lawyers, accountants, auctioneers, and others, after passing on the reasonability of their charges. It took occasion to recommend the reduction of many such charges,<sup>22</sup> and arranged for a time a considerable reduction in the fees of collection agencies by setting up an affiliated "Estates Collection Service" which was operated at a loss. This service was abandoned when it was held that the Estates

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19. Titles taken from FORM BANKRUPTCY No. 9, *Report of Referee in Bankruptcy to Clerk*. This has recently been replaced by FORM No. JS-19 in which "Gross Assets Realized" has been changed to "Net Proceeds Realized". The former title had occasioned some errors in reporting.

20. 52 STAT. 861 (1938), 11 U. S. C. § 76 (Supp. 1938).

21. DONOVAN REPORT 40-46; THACHER-GARRISON REPORT 29.

22. CELLER HEARINGS 495-497, 756-757, cf. 716-717.

Collection Service was a subsidiary company which could not charge fees apart from the receiver's own.<sup>23</sup> Thereafter, collection work was sometimes done by the trust company, and sometimes by collection agencies which usually charged larger fees than those of the Estates Collection Service.

In computing its own expenses, the company charged the actual salaries of its employees for the times actually spent on the case up to the maximum per diem rate provided for under the rules of court.<sup>24</sup> It also charged other expenses directly applicable to a case.<sup>25</sup> In addition, the court allowed commissions for the services of the trust company within the statutory limits.

Income from commissions was expected to cover overhead costs, salaries in excess of the maxima stated in the rules of court, expenses of no asset cases, etc., and to leave a balance for profit. Over the period, January 16, 1929-June 30, 1933, the receivership division of the trust company calculated a profit of \$167,572.50, after allowance for the corporate income tax. Losses in the first two fiscal years were more than balanced by gains in the last three.<sup>26</sup> This profit, of course, was gained from all the activities of the receivership division, including equity receiverships. Results for later years have not been made available by the trust company.

In addition to this source of revenue, the trust company received whatever profits its banking division made on the funds of bankruptcy and equity estates which were deposited with it. The trust company did not commence the transfer of such funds to itself until some months after it had become standing receiver. Effective January, 1930, the Supreme Court altered its bankruptcy rules to permit such a practice,<sup>27</sup> and the trust company subsequently complied with the rule. However, it never disturbed existing banking relationships when the operations of the business were to be continued.<sup>28</sup>

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23. *Id.* at 497-498, 752-754. *In re Cameo Curtains, Inc.*, 4 F. Supp. 672 (1933).

24. Per diem rates up to \$12 per day were allowed. 1 IRVING REPORT 58.

25. The Irving Trust Company's rule regarding such charges read as follows: ". . . the actual time spent by the group heads and the other Receiver's representatives, or their office assistants, in rendering administrative services to the particular estate. There are excluded from the time for which such charge is made, numerous time-consuming services, such as conferring with counsel, attending at creditors' meetings, attending at the Referees' offices, etc.

"The time actually spent by fieldmen in rendering services for the several estates.

"The time spent by members of the 'Inventory, Appraisal and Sales Service,' designated as 'Inspectors of Sales,' in attending upon and supervising auction sales.

"The collections made by the 'Estates Collection Service.'" 1 IRVING REPORT 59.

26. 2 *id.* at 36. A detailed break-down of expenses is given.

27. United States Supreme Court General Order in Bankruptcy, XLVI, 289 U. S. 617 (1930).

28. 1 IRVING REPORT 93.

The change in the bankruptcy rules was a result of representations by the trust company that it could not continue the receivership division without additional income.<sup>29</sup> At the time, the division was operating at a loss. The estimated profits obtained from these deposits without deductions for income taxes or general administrative overhead have been stated by the trust company to be \$469,530 for the period from March 1, 1930 to June 30, 1933.<sup>30</sup> During this same period the average deposits of bankruptcy and equity estates were about \$12,128,200; approximately 2½% of the average total deposits of the trust company.<sup>31</sup>

In studying the performance of the standing receiver, it must be recognized that the prompt realization of asset values is an outlet for efficiency in administration of estates that is fully as important as the reduction of expenses. The money values of assets deteriorate so rapidly after adjudication of bankruptcy that any slipshod procedure results in losses to an estate.<sup>32</sup> Through its permanent organization, the trust company was able to take prompt and effective action to collect accounts, to discover assets, and to get proper prices through auctions which had received adequate publicity.<sup>33</sup> Such matters were attended to with great care by the trust company in contrast to many cases of wilful misconduct on the parts of certain receivers and trustees.<sup>34</sup>

Viewing the improvements just indicated, it is surprising to find that the bankruptcy statistics reveal no great advantage in favor of the standing receiver when the entire eleven-year period is considered.

As shown in Table I below, the percent of the net amount realized used for fees and expenses of administration during the entire eleven-year period was 30.2 for 4,242 cases administered by the Irving Trust Company, and 28.3 for 23,856 cases administered by others. Year-by-year comparison, however, shows interesting differences. The superiority of the trust company was marked in cases closed in the period to June 30, 1933, but in later years other receivers were the leaders. This change took place both as a result of increasing rates of expenses in cases administered by the trust company and of decreasing cost ratios in cases administered by others. Examination of the percentages paid on unsecured claims shows similar changes. With this measure as a basis for comparison, the standing receiver shows a definite statistical superiority over the other receivers in four out of the first five years. After that, however, the comparison is less favorable.

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29. CELLER HEARINGS 544-548, 648-649, *cf.* 562.

30. *Id.* Communications from Irving Trust Co., dated November 24, 1933.

31. 2 IRVING REPORT 33.

32. DONOVAN REPORT 9-10, 66-69.

33. 1 IRVING REPORT 61-72.

34. THACHER-GARRISON REPORT 178-179; 1 IRVING REPORT 87-91.



TABLE I.

RESULTS OF BANKRUPTCY PROCEEDINGS IN THE SOUTHERN DISTRICT OF NEW YORK, AS TO WHICH  
REPORTS OF REFEREES WERE FILED WITH THE COURT, JULY 1, 1928-JUNE 30, 1939.

1	2	3	4	5	6	4 ÷ 3	5 ÷ 6
<i>Fiscal Year Ending June 30</i>	<i>Number of Cases Reported</i>	<i>Unsecured Claims Allowed</i>	<i>Paid to Unsecured Creditors</i>	<i>Fees and Expenses of Admin- istration</i>	<i>Net Proceeds ("Gross Assets") Realized</i>	<i>Percent of Unsecured Claims Paid</i>	<i>Percent of Net Proceeds Used for Fees and Expenses</i>
<i>Cases in which Irving Trust Company served as Receiver or Trustee</i>							
		(all cases)					
1929	2	\$ 17,113	\$ 5,320	\$ 950	\$ 6,800	31.1	14.0
1930	71	1,201,477	358,196	107,423	474,405	29.8	22.6
1931	446	9,827,915	992,842	430,636	1,536,390	10.1	23.0
1932	784	19,081,931	1,302,243	939,796	2,753,144	6.8	34.1
1933	1301	66,537,433	7,103,638	2,027,647	12,213,149	10.7	16.6
1934	469	55,238,307	447,919	372,649	1,149,742	.8	32.4
1935	727	47,675,304	2,327,542	1,469,017	4,611,136	4.9	31.9
		(asset cases)					
1936	267	59,786,717	9,523,815	3,885,995	14,712,342	16.0	26.4
1937	85	14,942,114	2,394,002	1,595,627	4,727,652	16.0	33.8
1938	56	24,669,933	2,470,379	4,233,619	7,215,717	10.0	58.7
1939	34	18,118,705	2,263,348	950,659	3,559,005	12.5	26.7
TOTAL	4242	\$317,096,949	\$29,189,244	\$16,014,018	\$52,959,482	9.2	30.2
<i>Cases in which Irving Trust Company did not serve as Receiver or Trustee</i>							
		(all cases)					
1929	2,239	\$60,464,573	\$ 6,275,611	\$ 3,962,672	\$11,953,348	10.4	33.2
1930	1,714	39,277,176	3,055,288	2,934,218	7,226,110	7.8	40.6
1931	1,869	40,882,312	2,907,542	4,177,746	7,744,506	7.1	53.9
1932	1,266	25,213,022	2,307,189	917,226	4,102,720	9.2	22.4
1933	1,897	59,051,955	8,544,228	4,144,762	15,782,228	14.5	26.3
1934	2,930	59,416,187	7,610,612	2,498,606	11,377,574	12.8	22.0
1935	1,875	73,636,620	1,464,447	659,216	2,752,110	19.9	24.0
		(asset cases)					
1936	2,186	20,012,477	3,214,346	1,783,853	6,734,985	16.5	26.5
1937	2,667	49,270,904	10,436,420	2,067,866	13,202,794	21.2	15.7
1938	2,734	not	1,569,736	1,190,798	3,024,460	....	39.4
1939	2,479	computed	1,371,950	1,658,037	7,812,786	....	21.2
TOTAL	23,856	.....	\$48,757,369	\$25,995,000	\$91,713,621	....	28.3

*Sources:*

1. All figures in years, 1929-1933, IRVING REPORT, II, 24, Schedule B-1.
2. Years, 1934-1939.
  - (a) Irving Trust Company furnished Docket Numbers of cases administered, for which cases figures were taken from original Reports of Referee filed in U. S. Dist. Ct.
  - (b) Totals for the district were taken from REP. ATT'Y GEN. (1934-1938) with unpublished figures furnished by Department of Justice.
  - (c) Figures for cases administered by others than Irving were found by subtraction.

*Notes:*

1. In 1932 and 1933 the District totals reported by Irving differ slightly from those reported by Attorney General, but the difference would change percentage figures only about 1%. In 1933 the Attorney General's totals were overstated about \$40,000,000 due to mistaken reporting in one large case (McClellan Stores, Docket 56218). Figures used herein are corrected by this amount.
2. Referee's reports for 96 cases on the list furnished by Irving were not found. 73 of these cases were concluded in fiscal year 1934, 16 in 1935, 2 in 1936, 3 in 1937, 1 in 1938 and 1 in 1939. The author believes that none of these cases was large enough to influence totals significantly.
3. Data collected for this study has been transferred to Hollerith cards which will be made available upon request.

A little more statistical information will be a useful preliminary to a discussion of the probable reasons for this development. Since the trust company took no new cases after July, 1934, the figures reported in later years represent those in which proceedings were drawn out by continued operation of the business, by litigation, or by other causes. Consequently, an increase in costs in the cases reported by the trust company after fiscal 1934 might naturally be expected. However plausible this hypothesis may seem, it does not fit the facts. As mentioned above, the bulk of the expenses of administration, as distinguished from fees, were incurred shortly after the receiver had been appointed, so there was little reason for higher costs in cases which were drawn out. The statistics confirm this idea. In Table II are presented the results of a classification by time of administration of 1,638 cases reported by the trust company after July 1, 1933. There is no evidence of a definite tendency for expenses to rise as time of administration increases, except in the last two groups. These contain, however, but one case each, consequently little reliance can be placed on the sharp increase shown. The weight of the evidence seems to show that the increasing age of the cases reported by the standing receiver cannot be the cause of the increasing costliness of its administration.

TABLE II.

SEGREGATION BY TIME OF ADMINISTRATION AND AMOUNT OF NET PROCEEDS OF FEES AND EXPENSES OF ADMINISTRATION AS A PERCENTAGE OF NET PROCEEDS.

1,638 Bankruptcy Cases administered by Irving Trust Company in Fiscal Years, 1934-1939

<i>Number of Years Administered</i>	<i>Number of Cases Reported</i>	<i>Percent of Net Proceeds used for Fees and Expenses</i>			
		<i>Size Grouping of Net Proceeds</i>			<i>Total</i>
		<i>No Assets</i>	<i>\$1.-50,000</i>	<i>\$50,001,—</i>	
0-1	320	0.0	50.9	....	50.9
1-2	684	0.0	46.0	14.9	30.4
2-3	291	0.0	41.3	13.1	21.2
3-4	147	0.0	43.4	28.8	29.8
4-5	94	0.0	45.5	33.4	37.9
5-6	56	0.0	51.2	53.4	53.4
6-7	30	0.0	42.7	22.8	24.4
7-8	9	....	53.1	16.5	19.9
8-9	3	....	57.1	....	57.1
9-10	2	....	33.6	16.2	17.5
10-11	1	....	80.0	....	80.0
11-12	1	....	74.8	....	74.8

In view of the facts just related, it is clear that the gradual dispersal of the receivership division of the trust company cannot have caused inefficiencies which led to increased ratios of expense. Within a few months after July 15, 1934, the major portion of the problems of all estates of the type under consideration had been handled, and only routine administration remained. Apparently there were no delays due to the

departure of some of the high-salaried, experienced men, who had been serving as "receiver's representatives," and the break-up of the highly organized staff;<sup>35</sup> hence no great effect on financial ratios could have resulted.

It can be argued with some weight that the cases reported during the early years of trust company administration did not present a fair sample for comparison with the work of others, since the standing receiver started with a clean slate, while the cases reported by others in any year represented a cross-section of all types and ages. Such an argument would proceed to the conclusion that the standing receiver's work must be evaluated over its whole experience; not by the results of the first few years when "problem cases" had not had their effect. But this contention runs into difficulty with the fact that increasing length of administration is not associated with higher costs. Even so, some value remains in the argument. The cases concluded under trust company administration after 1933 seem to have characteristics different from those settled so expeditiously in the earlier period. Perhaps the fact that assets were badly "frozen" in the later cases is associated with low recoveries on book values from the start of the bankruptcy, and with high ratios of expense of administration.

However, no matter what weight is given to the argument above, it cannot be considered a complete solution of the question, for it does not explain the changes in the results reported by other receivers and trustees. In part, this change was due to increasing control over commissions paid to referees. Prior to 1938, the fees of referees were fixed by statute. However, the district court in New York obtained in 1933 substantial reductions in the commissions of referees whose annual incomes were very large, chiefly by limiting amounts paid as indemnities or paid to referees as special masters.<sup>36</sup> In part also, this change may have been brought about by the effect of the activities of the standing receiver upon the bankruptcy bar. As will be shown below, conditions in the New York district prior to 1929 were very bad. The percent of net proceeds paid for fees of administration was 41.6 in 1924, 26.8 in 1925, 31.9 in 1927, and 43.0 in 1928. The five-year break introduced by the use of the standing receiver forced the former group to find new ways of earning a living, and released judges and referees from old ways of doing things. By 1934 there was available a group of lawyers who had had experience under the standing receiver. A "new deal" was possible. Unquestionably,

35. Irving Trust Company has been well known for its careful style of job organization. The organization of the receivership department is an example. 1 *IRVING REVIEW* 47-54.

36. 32 *STAT.* 799 (1903), 11 *U.S.C.* § 68 (1934), as amended, 52 *STAT.* 859, 11 *U.S.C.* § 68 (Supp. 1938); Bankruptcy Rule 21 (1933) of United States District Court, Southern District of New York.

the character of the bankruptcy bar in New York City was improved by the change.<sup>37</sup>

The most important clue seems to be found in the stages of the business cycle. The period in which the standing receiver was actively receiving appointments was on the whole one of severe economic depression. Bankruptcies were frequent, prices of all types of goods were very low, and buyers were hard to find. It will be remembered that the statistics used in this study relate chiefly to liquidations, and that in such cases the bulk of the selling was accomplished shortly after the declaration of bankruptcy. In view of the adverse conditions, the trust company's work can be held to be superior because it held its own in comparison with the work of others, most of whom carried on the bulk of their work under more favorable conditions. This contention would be particularly true of the statistics for fiscal 1935 and later years.

To summarize: the statistical comparison over the entire eleven-year period does not establish any clear superiority for the standing receiver, such as was claimed for it on the basis of the results of the first five years. It appears that part of the apparent superiority was due to the fact that the standing receiver started with a clean slate. Nevertheless, the burden of proof still rests with those who attack the standing receiver, since its figures are about as satisfactory as those of other receivers who operated at more favorable stages of the business cycle. Finally, the interjection of the standing receiver gave an opportunity for a clean-up of the bankruptcy bar in New York City.<sup>38</sup>

37. DONOVAN REPORT 40-50, 103. *Hearings before Senate Judiciary Committee on S 3866*, 72nd Cong., 1st Sess. (1932) 392.

38. An interesting sidelight on business organization appeared during the making of this study. At the time of making the calculations referred to above, the author segregated the cases of corporate debtors from those of non-corporate debtors. The results, which are presented below, show that creditors of corporations fared better than creditors of other types of business enterprise. This is a direct contradiction of the traditional consequences of limited liability.

SEGREGATION BY TYPE OF BUSINESS UNIT OF RESULTS OF 1,638 BANKRUPTCIES ADMINISTERED BY IRVING TRUST COMPANY IN FISCAL YEARS, 1934-1939

<i>Size Grouping of Net Proceeds</i>	<i>Number of Cases Reported</i>	<i>Percent of Proved Unsecured Claims Paid</i>
<i>Corporate Debtors</i>		
No Assets	28	0.0
\$1,-50,000	683	4.4
\$50,001,—	59	17.1
TOTAL	770	13.2
<i>Non-Corporate Debtors</i>		
No Assets	245	0.0
\$1,-50,000	615	0.5
\$50,001,—	8	16.7
TOTAL	868	1.0

## III.

The decision of the district judges in New York City which led to the appointment of a standing receiver in January, 1929, came after many years of general dissatisfaction with existing practices of selecting receivers and trustees. It came just after the discovery of certain specific embezzlements of major importance which had led to several convictions and to disciplinary action both among members of the bar and among employees of the court itself, as well as to the resignation of one district judge against whom impeachment proceedings had been threatened.<sup>39</sup>

The necessity for improvement had been recognized for some time,<sup>40</sup> and several other reform procedures had previously been tried without success. The selection of promising young lawyers known to the judges fell down, because in many cases the lawyers were busy at other work just at the time when prompt action was necessary to preserve assets. Advancing the date of the first meeting of creditors in order to avoid the appointment of a receiver resulted in even greater non-attendance. The selection of receivers from a panel recommended by trade associations failed because the members of the panel refused cases unless large fees were in prospect. The selection by the judges of a panel of individuals to act as receivers in all cases was considered by the judges to be impracticable because of the probable use of pressures by politicians and others to influence the choice of personnel.<sup>41</sup>

The use of the Irving Trust Company as standing receiver contained the essence of the principal reform proposals put forward by proponents of change both before and after the use of a standing receiver in the New York district.<sup>42</sup> That is, there was created a permanent organization of responsible men whose full time was devoted to the management of bankruptcy estates. This organization received all cases, large and small, with the expectation that the excess statutory fees of larger cases would cover the losses in the smaller ones. The facts that the work in New York was done by a department of a private corporation and

39. DONOVAN REPORT 48-50; CELLER HEARINGS 539-540, 552, 582-583.

40. *Id.* at 528-541. There was nation-wide dissatisfaction among judges. TEACHER-GARRISON REPORT 4-5.

41. CELLER HEARINGS 530-535; DONOVAN REPORT 70-71.

42. Salaried receiver appointed by judges of the district, trustee to be elected only in larger cases, REPORT OF THE SPECIAL COMMITTEE ON BANKRUPTCY OF THE MERCHANTS' ASSOCIATION OF NEW YORK (1924) 7-S; official receiver for smaller cases, REPORT OF THE SPECIAL COMMITTEE ON BANKRUPTCY ADMINISTRATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1925) 18-19; creation of a national officer to qualify suitable trustees, judges to appoint from among them, DONOVAN REPORT 26-27; TEACHER-GARRISON REPORT 107-114; "SABATH BILL," 75th Cong., 1st Sess., H. R. 9 (1937), reprinted in *Hearings before House Judiciary Committee on H. R. 9 and H. R. 6963*, 75th Cong., 1st Sess., Ser. 10 (1937) 1-11, 130; cf. *Hearings before House Judiciary Committee on H. R. 6439 and H. R. 8046*, 75th Cong., 1st Sess. (1937) 107-108.

that there was a monopoly of receiverships in the district are of secondary importance to the present study. They involve important issues which are briefly discussed below but they do not affect the fact that a permanent official was created.

Opposition to and support for the plan finally chosen soon appeared in resolutions of associations of merchants and the bar, in statements by individuals, in testimony before various public hearings, and in legislation designed to end the activities of the Irving Trust Company as standing receiver. The debate culminated in hearings before a subcommittee of the House Committee on the Judiciary, headed by Representative Celler, which heard evidence in New York in October, 1933, and later reported favorably the 1934 legislation.<sup>43</sup>

In general, the plan was supported by credit men, judges and bankers, and criticized by bar associations and legislators.<sup>44</sup> It would not be difficult to show that those who were the principal gainers from the prior system became the principal critics of the standing receiver.<sup>45</sup> Their arguments can be classified and criticized as follows.

1. *Objections to the device of a standing receiver and trustee.* The argument was made that the problems of different bankruptcies were so diverse that specialists were required to administer the various types. A permanent officer could not therefore be sufficiently informed in all

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43. In addition to this legislation, bills were introduced in several sessions of the New York State Legislature designed to end the practice by forbidding state-chartered corporations to act as receivers in bankruptcy. Governor Lehman vetoed such bills in 1933, 1934, 1935 and 1936 on the grounds that the bills would interfere with the discretion of a federal agency. See N. Y. Senate Bill Printed No. 86, Jan. 2, 1936, 1 N. Y. SEN. JOUR. 19 (1936) and Veto Message dated March 14, 1936, 2 N. Y. SEN. J. (EXEC. 170-171, 1936). See p. 3, *supra*.

44. At the Celler Hearings, the opponents of the standing receiver were individual attorneys and representatives of the Federal Bar Association of New York, New Jersey and Connecticut, New York County Lawyers Association, New York State Bar Association, Brooklyn Bar Association, Nassau County Bar Association, Queens County Bar Association, Richmond County Bar Association and the Bronx County Bar Association. The proponents of the reform, aside from the Irving Trust Company and associated attorneys, were the senior judge of the district, and representatives of the Merchants' Association of New York, New York Board of Trade, New York Credit Men's Association, Association of Cotton Textile Merchants of New York, Uptown Credit Group of Textile Industry Division of Silk Association of America, Credit Clearing House, Downtown Textile Credit Group and the Chamber of Commerce of the City of New York.

45. *E.g.*, the statement of an attorney in CELLER HEARINGS 718: ". . . there are approximately eighteen to nineteen thousand lawyers in . . . New York, employing probably twenty thousand in help . . . and we find that . . . these lawyers are practically outlawed in the way of acting as receivers." Cf. the Joint Resolution of the New York State Legislature asking the Congress of the United States to end the monopoly, which says *inter alia*, "A large volume of professional legal employment which legitimately belong to the legal profession . . . is diverted to banking corporations," N. Y. Sen. Res., Feb. 3, 1933, 1 N. Y. Ass. J. 511 (1933).

fields. Further, it was claimed that the problems met in the liquidation of assets were chiefly business ones, not legal or banking in nature. Consequently, creditors should continue to select trustees in each case, and judges should appoint receivers specially versed in appropriate fields.

This line of argument ignores the nation-wide experience that the traditional method of selecting receivers and trustees has been most unsatisfactory.<sup>46</sup> The results of such a method cannot be cured by a statement that the judges have been to blame. Even were the judges to neglect more pressing duties in order to examine carefully the needs of each bankrupt estate and the qualifications of proposed receivers, it would be impossible to obtain men of high ability for the majority of cases, because of the insufficiency of fees.<sup>47</sup> The best that can be hoped for under such a plan is satisfactory administration of large-asset cases.

Further, the general apathy of creditors which results in the selection of poor trustees cannot be cured, for although some increase in interest might be stimulated by proper education through credit associations, the amounts involved in a majority of cases would not justify the time and effort necessary for attendance at the election of trustees, nor provide sufficient revenue to interest a high-quality man in the position.

Finally, the contention that a standing receiver is not sufficiently versatile is not realistic, for the problems arising in liquidations are not so varied as those in going concerns, and the bankruptcy business of most districts is so large that the receiver can easily have in his office staff specialists who have the necessary knowledge. This was the case with the Irving Trust Company,<sup>48</sup> and could be the case under any similar proposal, such as the creation of a panel of qualified trustees.<sup>49</sup>

2. *Objections to a monopoly of receiverships in a district.* At the Celler hearings, several witnesses argued that the existence of a monopoly in bankruptcy administration would confer upon a standing receiver powers of patronage which might lead to domination of the bar. From this premise, the alternative conclusions were either that there should not be such monopolies or that the official receiver should be a court official. While this argument was the most influential on the Celler Committee,<sup>50</sup> it does not stand close inspection, for the fear of domination of the bar through monopoly in bankruptcy grossly exaggerates both the supine

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46. See notes 4, 5 and 6, *supra*.

47. DONOVAN REPORT 75-78; THACHER-GARRISON REPORT 110-114; CELLER HEARINGS 557-558, 569.

48. 1 IRVING REPORT 47-57.

49. THACHER-GARRISON REPORT 105-109.

50. There was considerable concentration of legal business in cases administered by Irving, especially in the early years of its incumbency. This practice was widely criticized. 1 IRVING REPORT 97-102; 2 IRVING REPORT 25-28; CELLER HEARINGS 2, 100, 639-644, 715-719, 720-721; CELLER REPORT 3.

qualities of lawyers and the importance of bankruptcy revenues to the bar as a whole.

A more substantial point related to the monopoly associated with one standing receiver in a district is the inevitability that adverse interests will sometimes be encountered. Thus, the Irving Trust Company as a bank might be a creditor of a bankrupt estate to which the Irving Trust Company had been appointed receiver. More important, there might be two or more bankrupt estates having conflicting claims one against another; yet the standing receiver might easily be receiver or trustee of all. Also, in a few cases the trust company might at the same time be supervising continuing businesses which were in direct competition with each other.

No one will deny the wisdom of the general principle that adverse interests should be avoided. Even Judge Knox, the principal judicial proponent of the standing receiver in New York, has stated that such conflicts of interest must be carefully watched.<sup>51</sup> But two points should be noted. First, however strong the feeling against adverse interests, it cannot be made the basis of an attack against the idea of a standing receiver and trustee. The difficulty can be avoided by having more than one such official in each district.<sup>52</sup> Second, there is no evidence that the Irving Trust Company acted improperly in any case. If the trust company foresaw this issue, it might decline to be nominated as trustee.<sup>53</sup> In any case where adverse interests were discovered, it acted only after the creditors and the court had been fully informed of the circumstances.<sup>54</sup>

3. *Objections to the use of a trust company in the position of standing receiver.* Some persons contended that no corporation could do the work of administration so well as an individual who could give the matter personal attention. This contention involves the familiar question of the "corporate practice of law" which carries no conviction to the author's mind. The idea that a corporation is an insensate being which makes only mechanistic decisions is certainly as false as any claim that lawyers as receivers are uniformly efficient, honest, and sympathetic.

Another unsubstantial objection was voiced by certain Congressmen who pointed out that the Irving Trust Company, as receiver or trustee, was making unfair profits by depositing funds with itself as bank. This, it was claimed, enabled the receiver to make 6% on funds for which it paid only 1/2%.<sup>55</sup> Of course, since the receiver is not supposed to lend the cash funds of the estate, he cannot be expected to do more than put

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51. CELLER HEARINGS 587-588.

52. See note 42, *supra*.

53. CELLER HEARINGS 493.

54. *Id.* at 396, 493.

55. *Joint Hearings before Senate and House Judiciary Committees on S. 3866*, 72d Cong., 1st. Sess., (1932) 346; CELLER REPORT 3.



them into the care of some bank. There could not be any damage to creditors in the procedure outlined so long as the Irving Trust Company, as a bank, remained solvent.<sup>56</sup> The policy did, however, contribute substantially to the earnings which should be attributed to the receivership division of the trust company.

The result of these considerations can be summarized as follows. First, evidence of nation-wide misuse of the positions of individual receivers and trustees, and their attorneys, gives strong ground for a conclusion that existing practices must be reformed. Second, of all the reform proposals, that of a standing receiver and trustee has the most theoretical merit. Finally, the record of actual administration by the standing receiver in New York supports the general arguments in favor of this method of reform.

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56. Shortly after beginning to deposit these funds with itself, the trust company was required to post United States bonds of equivalent value to secure the deposits. 1 *IRVING REPORT* 94.